

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**CHERYL STUTESMAN**  
Claimant

VS.

**BEST WESTERN HOSPITALITY HOUSE**  
Respondent

AND

**KANSAS RESTAURANT AND  
HOSPITALITY ASSOCIATION**  
Insurance Carrier

Docket No. 1,000,726

**ORDER**

Claimant requested review of the February 7, 2005 Award by Administrative Law Judge (ALJ) Brad E. Avery. The Board heard oral argument on April 22, 2005, in Wichita, Kansas.

**APPEARANCES**

Michael C. Helbert, of Emporia, Kansas, appeared for the claimant. Jeffrey R. Brewer, of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

**RECORD AND STIPULATIONS**

The Board has considered the record and adopted the stipulations listed in the Award. The parties also agree that there is no dispute that the follow-up letter dated May 17, 2004, and issued by Dr. Hoffman, the court ordered independent medical examiner, comes into evidence under K.S.A. 44-516.

### ISSUES

The ALJ adopted the findings of Dr. Philip Mills and awarded claimant an 11 percent functional impairment of the left upper extremity at the level of the shoulder.<sup>1</sup> In making this finding, the ALJ rejected the findings of the independent medical examiner, Dr. Mary Ann Hoffman, and that of Dr. Lynn Curtis, reasoning that those physicians either failed to find claimant's complaints were attributable to her work-related accident or failed to offer any permanent impairment opinion.

The claimant requests review of the nature and extent of her disability. Claimant maintains she suffered an injury to her neck and back as well as her left shoulder as a result of her work-related accident. She further maintains that she has been unable to return to work following her accident and is entitled to permanent partial general body disability (work disability) in excess of the 29 percent whole person functional impairment assigned by Dr. Hoffman. Claimant contends she has a 75 percent task loss and despite her limited efforts to obtain employment, she has a 12 percent wage loss<sup>2</sup> as a result of that accident. When averaged, these figures yield a 43.5 percent work disability.

Respondent asserts that the ALJ's Award should be affirmed with one slight modification. Respondent concedes the ALJ's Award should reflect an 11 percent permanent partial disability to the level of the shoulder rather than the arm. Respondent maintains claimant's impairment was appropriately limited to a scheduled injury rather than as a whole body impairment. Respondent asserts that Dr. Hoffman's opinions are anything but credible and that the ALJ correctly disregarded them. When left with just one remaining opinion as to claimant's permanent functional impairment, that offered by Dr. Mills, the ALJ made the appropriate decision and awarded claimant an 11 percent permanent partial impairment to her arm (which should be to the shoulder).

The sole issue to be addressed in this appeal is the nature and extent of claimant's impairment, and if applicable, whether claimant is entitled to work disability benefits under K.S.A. 44-510e(a).

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<sup>1</sup> The parties agreed that the ALJ's Award incorrectly awarded benefits at the 210 week level rather than the correct 225 week level for a permanent impairment at the shoulder.

<sup>2</sup> Claimant concedes she made no effort to seek employment post-injury until just before the Regular Hearing. As a result, a wage must be imputed. The only evidence as to the capacity to earn wages is the \$5.50 per hour testified to by Mr. Lindahl. That figure, when multiplied by 40 hours and compared to the preinjury average weekly wage of \$250.90 yields a 12 percent wage loss.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the entire evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

On October 9, 2001, claimant sustained a compensable injury while working for respondent as a cook. As claimant was preparing to change shifts, she slipped and fell. Claimant testified that she "jabbed my [left] elbow on the table and twisted my back and my neck."<sup>3</sup> There is no dispute that claimant injured her elbow and shoulder in this accident. Rather, the dispute stems from whether claimant also injured her back and/or neck as well.

After some initial conservative treatment, claimant was referred to Dr. Ernie Swanson, a neurologist, who first started treating claimant in 2002. Dr. Swanson initially suspected she had left ulnar neuropathy and possibly lumbar radiculopathy along with cervical spinal canal changes. He recommended she undergo an MRI, which revealed a "relatively large osteophyte in the C-spine" protruding to the left.<sup>4</sup> He eventually ruled out the ulnar nerve problem and diagnosed significant degenerative changes in her cervical spine along with radicular symptoms at times into her lower extremities. Throughout treatment claimant complained of diffuse pain involving the spine as well as both arms, more so on the left than the right.

Although he did not diagnose her with carpal tunnel, Dr. Swanson's records and his deposition testimony make it clear that he became aware that claimant had received that diagnosis at some point after her accident. When asked, Dr. Swanson testified that he believed the carpal tunnel "could easily be a consequence of the fall", or stated another way, he is suspicious that there's a relationship between that condition and the fall.<sup>5</sup> He also testified that it would be difficult to attribute some of her other diffuse complaints to the legs and arms to her accident. Dr. Swanson offered no permanent impairment assessment. He ultimately concluded she had a temporary aggravation of her overall baseline condition because of her injury, but that she had returned to her pre-accident state.<sup>6</sup>

At respondent's request, Dr. Philip Mills saw claimant on April 24, 2003. His report indicates that claimant reported that her health was normal until she slipped and fell on her

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<sup>3</sup> R.H. Trans. at 6.

<sup>4</sup> Swanson Depo. at 8.

<sup>5</sup> *Id.* at 24.

<sup>6</sup> *Id.* at 23.

right elbow and twisted her back on October 9, 2001. Claimant then began to experience pain from her elbow to her neck and down into her low back.<sup>7</sup> Dr. Mills diagnosed left carpal tunnel secondary to the fall, impingement syndrome of the left shoulder, secondary to the fall, degenerative arthritis of the cervical and lumbar spine, and degenerative disease of the cervical and thoracic spine, which was considered multifactorial.

Dr. Mills opined that claimant had reached maximum medical improvement (MMI) and assigned her a 10 percent permanent partial impairment to the left upper extremity for the left-sided carpal tunnel syndrome, 1 percent permanent partial impairment to the left upper extremity for shoulder impingement syndrome, and using the combined values chart of the fourth edition of the *Guides*<sup>8</sup> concluded this equals an 11 percent permanent partial impairment to the left upper extremity (to the level of the shoulder) for problems related to claimant's fall.<sup>9</sup>

Dr. Mills did not assess any impairment for the low back complaints. He indicated that there were a number of factors including claimant's job that could have had an impact on her lumbar, thoracic spine and cervical spine problems:

Q. It could also be that it means that there could be a number of reasons or factors that contributed to the end result?

A. That is kind of what I just said.

Q. So the job that she was doing could have had an impact on the problems that she had in her lumbar, thoracic and cervical spine; is that correct?

A. That is right. All of those are possibilities, that and a lot of other things. You can't really say with a reasonable degree of medical probability what is or what is not the contributor here.<sup>10</sup>

Dr. Mills advised claimant to only work with good body mechanics and to avoid prolonged or repetitious neck hyperextension, or prolonged or repetitious forward flexion and twist/bend. Claimant was also told to avoid reaching and overhead work on a

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<sup>7</sup> Mills Depo., Ex. 2 at 1.

<sup>8</sup> American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, (4<sup>th</sup> ed.). All references are to the 4<sup>th</sup> ed. of the *Guides* unless otherwise noted.

<sup>9</sup> *Id.*, Ex. 2 at 5.

<sup>10</sup> *Id.* at 15.

repetitious or prolonged basis on the left and to avoid the use of vibratory tools and pounding with the left wrist.<sup>11</sup>

Claimant saw Dr. Lynn Curtis at the request of her attorney in March of 2003. In his report dated March 24, 2003, he indicated that claimant slipped on a wet floor and struck the table on her left side. Claimant reported that the pain in her left arm, neck and back, which Dr. Curtis attributed to the fall, became progressively worse. Upon examination Dr. Curtis found that claimant had full active range of motion of her bilateral shoulders, limited rotation left of her neck and limited flexion of her neck. He observed mild muscle spasms at the mid-cervical paraspinals on the left with motion. Claimant's muscle tone decreased with weight shifting.

Dr. Curtis concluded that claimant's work-related accident has caused her to suffer from a neck injury at C5-6, exacerbation of cervical degenerative disk disease, persistent left arm pain, a low back injury at the L4-5 level, hypertension and headache, chronic pain syndrome as well as carpal tunnel in the left upper extremity, all related to her work-related injury.<sup>12</sup>

Dr. Curtis opined that claimant was not presently at MMI. Although no permanent impairment rating was offered, claimant was given temporary work restrictions of either sitting or standing at work, so that she could switch positions after 30 minutes, could occasionally bend/stoop, and could lift no more than 10 pounds. Claimant was also advised not to kneel, crawl or climb.

Because the parties were unable to agree upon claimant's functional impairment, the ALJ appointed Dr. Mary Ann Hoffmann to perform an independent medical examination. Claimant maintains the ALJ misread Dr. Hoffman's report, and that the 29 percent whole body impairment assigned by Dr. Hoffman is appropriate. Respondent asserts that Dr. Hoffman's rating is so excessive that it lacks credibility and was not done in the manner provided for in the *Guides*.<sup>13</sup>

Dr. Hoffman saw claimant on April 23, 2004. As of that time, claimant's main complaints were to her neck and low back, left arm and left knee. She also complained of burning and itching in both forearms and upper arms along with dysesthesia. Claimant also described her feet and legs going numb which caused them to give way and allowing her to fall. According to Dr. Hoffman's report, Dr. Swanson had been treating claimant with a whole host of medicines, but none of them seemed to be helping.

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<sup>11</sup> *Id.*, Ex. 2 at 5.

<sup>12</sup> Curtis Depo., Ex. 1 at 5.

<sup>13</sup> American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, (4<sup>th</sup> ed.). All references are to the 4<sup>th</sup> ed. of the *Guides* unless otherwise noted.

After reiterating all of claimant's complaints and her course of history, Dr. Hoffman indicated that -

[i]t is my opinion that this patient has pretty much reached her maximum medical benefit in terms of her back and neck pain. She still requires treatment of her carpal tunnel and her impingement syndrome, but I don't think they are work-related. As far as a rating is concerned, I have come up with numbers involving both the cervical and lumbar spine, based on range of motion impairments using tables. . . This would give her a 29 % permanent partial disability on the body as a whole.<sup>14</sup>

In a follow-up letter, Dr. Hoffman stated that claimant does have permanent restrictions of activity in regard to the neck and back injury. In her opinion claimant should avoid sitting, standing or walking for longer than one hour, should avoid bending, stooping or twisting, should not look down on a repetitive basis to work with the neck extended backwards so that claimant has to look above shoulder height, and should not lift, carry, push or pull more than 20 pounds and should avoid ladders.<sup>15</sup>

Claimant was also evaluated by Doug Lindahl for purposes of establishing a task loss attributable to her accident. According to Mr. Lindahl, claimant has a history of 12 tasks in her past 15 year job history. He further testified that claimant retains the capacity to work 40 hours per week and earn \$5.50 per hour.<sup>16</sup> Although claimant was released to return to work in October of 2001, claimant began looking for work just before her Regular Hearing in October 2004.

At his deposition, Dr. Curtis was asked to use these permanent restrictions imposed by Dr. Hoffman and testified that claimant sustained a 75 percent task loss based upon Mr. Lindahl's task list.

When the ALJ reviewed the evidence, he concluded that the testimony of Dr. Mills was more persuasive than that of Dr. Curtis, who found claimant was not yet at MMI, or Dr. Swanson, who provided no functional impairment rating. While the independent medical examiner, Dr. Hoffman, provided a 29 percent impairment rating, the ALJ concluded she did not expressly "attribute any portion of the impairment rating provided to the October 9, 2001 accident."<sup>17</sup> Moreover, she attributed some of claimant's symptoms to carpal tunnel syndrome and shoulder impingement, but then went on to say those conditions were not

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<sup>14</sup> Dr. Hoffman's Apr. 23, 2004 Report at 4.

<sup>15</sup> Curtis Depo., Ex. 3.

<sup>16</sup> Claimant's counsel concedes this is the only evidence as to claimant's post-injury wage earning ability, and that a wage must be imputed as she did not put forth a good faith effort to obtain post-injury employment until just before the Regular Hearing.

<sup>17</sup> ALJ Award (Feb. 7, 2005) at 2.

attributable to her work-related injury. Thus, of the ratings contained within the record, the ALJ concluded Dr. Mills was the more persuasive of the two and awarded claimant the 11 percent to the shoulder offered by Dr. Mills.

The Board has considered the parties' arguments and the medical evidence and concludes the ALJ's Award should be affirmed. The Board agrees with claimant that the ALJ erroneously interpreted Dr. Hoffman's report. While it is true that Dr. Hoffman's report states that claimant's carpal tunnel syndrome and shoulder impingement were unrelated to her industrial accident, Dr. Hoffman then turned her focus on rating those aspects of claimant's condition that she believed were work related. Unlike the ALJ, the Board believes her report implicitly concludes that the 29 percent permanent impairment is attributable to those conditions Dr. Hoffman believed were work-related. However, Dr. Hoffman's report is deficient in other ways.

Dr. Hoffman rated claimant's condition based upon the range of motion methodology. While use of the range of motion methodology, standing alone, does not necessarily make her opinion less credible, it would have been helpful to have Dr. Hoffman explain her rationale for using that method to the exclusion of the DRE's. Moreover, her 29 percent rating is significantly higher than the other ratings offered by the other physicians. So much so, that it is difficult to give it much credence without further elaboration or explanation. Thus, just like the ALJ, the Board is not persuaded by her opinions.

That leaves the trier of fact with the opinions of Dr. Curtis, who found claimant was not at MMI, Dr. Swanson, who offered no impairment rating, and the opinions of Dr. Mills, who assessed the permanency at claimant's elbow and shoulder only. While the Board is persuaded that claimant sustained an aggravation of her degenerative back condition, the Board is not persuaded by the evidence contained within this record that the aggravation left claimant with a permanent impairment. Having failed to meet her burden of proof, the Board finds the ALJ's Award of 11 percent should be affirmed and modified to reflect that the impairment is to shoulder and so that the appropriate amount of benefit weeks may be awarded.

All other findings and conclusions contained within the ALJ's Award are hereby affirmed to the extent they are not modified herein.

#### **AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated February 7, 2005, is modified as follows:

The claimant is entitled to 14 weeks of temporary total disability compensation at the rate of \$167.28 per week in the amount of \$2,341.92 followed by 23.21 weeks of permanent partial disability compensation, at the rate of \$167.28 per week, in the amount

of \$3,882.57 for a 11 percent loss of use of the shoulder, making a total award of \$6,224.49.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of May, 2005.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Michael C. Helbert, Attorney for Claimant  
Jeffrey R. Brewer, Attorney for Respondent and its Insurance Carrier  
Brad E. Avery, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director